

1. Does this Board have jurisdiction to review the ALJ's Order of June 16, 2011?
2. If so, did the ALJ exceed his jurisdiction by reinstating claimant's benefits, including medical treatment and temporary total disability benefits, as of the date of suspension?
3. Did the ALJ exceed his jurisdiction by appointing a treating physician?
4. Should Exhibit A to claimant's brief be considered by the Board Member?

5. If the Board has jurisdiction, should K.S.A. 2011 Kansas Session Laws 44-510h(b)(1) and 44-515 apply retroactively?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant suffered a low back injury on August 21, 2009.¹ Notes from claimant's March 29, 2010, visit to Dr. Romeo Smith at the Wichita Clinic state in part:

The patient returns today for followup of the above diagnosis. The patient was last seen on 08/31/2009. She states around October or December she cannot remember when, she started having some numbness and tingling in her right leg. The patient saw her primary care doctor who referred her for therapy for pain in her leg. She states that they got a MRI this month. The patient states she was taking Lortab with minimal improvement in her pain. She states she has shooting pain in her hips, numbness and tingling that goes down in her right leg and her right foot falls asleep. The patient states initially her primary care doctor put [her] on muscle relaxant but that was stopped. The patient brought in a report of MRI that was done on 03/17/2010 without contrast at Wesley Medical Center, impression, right foraminal disc protrusion resulting in severe right foraminal stenosis with mass effect on the right L5 and S1 nerve roots and posture annual tears at L4-L5, mild muscle level of degenerative changes.²

In April 2010, Sedgwick Claims Management Services, Inc. (Sedgwick), which administers workers compensation claims on behalf of respondent, notified claimant it was denying further benefits. The parties later approved and submitted to ALJ Clark an Order, which the ALJ entered on June 10, 2010, granting claimant authorized medical treatment with Dr. Douglas Burton and temporary total disability benefits.

In August 2010, claimant saw Dr. Burton, who recommended epidural injections for claimant's injured back. Dr. David Sollo provided an epidural injection in September 2010, but claimant indicated it did not benefit her. Claimant testified that on January 28, 2011, she saw Dr. Burton and he recommended surgery for claimant's herniated disk. Claimant indicated she told Dr. Burton she wanted to wait and think about it and would try to go back to work.³

¹ The accident has been pled as a series: August 21, 2009, and each and every working day thereafter. Application for Hearing (filed May 28, 2010).

² P.H. Trans., Cl. Ex. 1.

³ *Id.*, at 19-20.

Claimant testified that she next saw Dr. Burton on March 4, 2011. Claimant indicated she told Dr. Burton she was still trying to see if respondent would take her back. Claimant told the doctor she wanted another month to see if respondent would accept her back to work.⁴ An April 8, 2011, appointment was made for claimant to see Dr. Burton.

Claimant testified that she was not comfortable with Dr. Burton performing the surgery, because he told her there was a 50% chance that in five years she would be “right where I was today.”⁵ Claimant indicated she wanted to have a neurosurgeon perform the surgery and, after researching the matter, claimant determined that she wanted Dr. Moufarrij to perform the surgery.

On March 25, 2011, claimant’s counsel notified respondent’s counsel that claimant would be unavailable for the April 8, 2011, appointment and asked that the appointment be rescheduled.⁶ Claimant testified she was unable to go to the April 8, 2011, appointment because she had a prior commitment. The appointment was rescheduled for May 27, 2011, and claimant admitted she missed the appointment. On June 14, 2011, claimant’s counsel received a June 9, 2011, letter from respondent’s counsel as notification that all of claimant’s benefits had been suspended until claimant is compliant with medical treatment and care recommended by Dr. Burton.⁷ Claimant testified that on April 6, 2011, she received notice from respondent that she had been discharged from her employment.

After the June 10, 2010, Order, claimant’s counsel sent two Notice of Intent letters to respondent’s attorney – one dated November 29, 2010, and the other dated January 27, 2011. Neither of these documents requested the ALJ appoint a treating physician. Claimant then filed an Application for Preliminary Hearing.⁸ At the preliminary hearing, respondent’s counsel did not contemporaneously object to claimant’s request for the ALJ to appoint a treating physician. Only in his closing argument did respondent’s counsel allege claimant needed to request a change of physician.

Compensability of claimant’s injury was not an issue at the June 16, 2011, preliminary hearing. At preliminary hearing, claimant requested that: (1) respondent be ordered to pay a bill to Wichita Clinic for a prescription by Dr. Romeo Smith; (2) because respondent allegedly failed to provide authorized medical treatment, that claimant be allowed to select Dr. Moufarrij as her treating physician and in the alternative select from

⁴ *Id.*, at 20-21.

⁵ *Id.*, at 16.

⁶ *Id.*, Resp. Ex. 3.

⁷ *Id.*, Cl. Ex. 7.

⁸ *Id.*, Cl. Ex 4.

a list of three physicians; (3) reinstatement of all benefits, including temporary total disability benefits (TTD); and (4) penalties be awarded claimant because respondent intentionally violated the previous Order of the ALJ ordering medical treatment and payment of TTD.⁹

At the preliminary hearing, respondent indicated it agreed to pay the medical bill to Wichita Clinic¹⁰ and the ALJ ordered payment of the same in the June 16, 2011, Order. Respondent argues that claimant failed to file an Application for Preliminary Hearing requesting a change of physician. Respondent also asserts that K.S.A. 2011 Kansas Session Laws 44-515 and 44-510h(b)(1) should apply retroactively to this claim. K.S.A. 2011 Kansas Session Laws 44-515 allows an employer to suspend an employee's benefits if the employee refuses to submit to an examination by an authorized treating physician. Respondent also alleges the ALJ failed to follow the procedure for selecting an alternate physician as set out in K.S.A. 2011 Kansas Session Laws 44-510h(b)(1).

The ALJ articulated his findings at the June 16, 2011, preliminary hearing:

The Court: And so it starts. It's a procedural change. Medical as set out in Claimant's Exhibit 2 is ordered paid as authorized. All benefits, including medical treatment and temporary total disability benefits, are ordered reinstated effective the date that they were terminated. I find Dr. Burton -- is he the one that moves around from Kansas City?

Mr. Torline: Yes.

The Court: That's unsatisfactory. I find Dr. Moufarrij to be the authorized treating physician. Thank you. That concludes this hearing.¹¹

In his Order, the ALJ did not indicate whether he applied retroactively K.S.A. 2011 Kansas Session Laws 44-515 and 44-510h. Two possibilities exist. The ALJ could have found K.S.A. 2011 Kansas Session Laws 44-515 and 44-510h do not apply retroactively. In the alternative, the ALJ could have retroactively applied those laws, but determined claimant cooperated with Dr. Burton and did not refuse treatment.

In her brief, claimant attached Exhibit A, which contains e-mails exchanged between claimant's attorney and respondent's attorney. In its reply brief, respondent asks this Board Member not consider these documents as they are not part of the record.

⁹ The ALJ was silent on the issue of penalties and this issue was not appealed by any of the parties.

¹⁰ P.H. Trans. at 9, 11.

¹¹ *Id.*, at 28.

PRINCIPLES OF LAW AND ANALYSIS

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,¹² the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

The compensability of claimant's low back injury was not an issue at the June 16, 2011, preliminary hearing. Respondent asserts that the ALJ exceeded his jurisdiction in granting the relief requested by claimant and that the Board, pursuant to K.S.A. 2010 Supp. 44-551(i)(2)(A), has jurisdiction to review the ALJ's Order. In its reply brief, respondent states, "Here, Respondent asserts that Judge Clark exceeded his authority by granting Claimant a change of treating physician notwithstanding Claimant's failure to

¹² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

comply with the requirements of K.S.A. 44-510h. This issue is expressly appealable pursuant to K.S.A. 44-551(i)(2)(A). As such, no consideration of the jurisdictional issues listed in K.S.A. 44-534a is required.”¹³ Respondent argues the ALJ exceeded his jurisdiction by allowing a change of physician and reinstating claimant’s benefits.

Respondent’s counsel sent a letter dated June 9, 2011, to claimant’s counsel as notification that all benefits for claimant had been suspended until she is compliant with medical treatment and care recommended by Dr. Burton. Dr. Burton’s recommendation was either surgery or “live with it.”

Respondent is not denying claimant’s work-related injury necessitated the recommended surgery. Nor is respondent claiming the recommended surgery is unreasonable, unnecessary or inappropriate. Respondent asserts the ALJ exceeded his authority by appointing Dr. Moufarrij as claimant’s authorized treating physician and reinstating claimant’s benefits. The mere assertion by a party that the ALJ exceeded his or her jurisdiction on a particular issue does not automatically give this Board jurisdiction to review that issue. The ALJ has the jurisdiction and authority to grant medical benefits at a preliminary hearing.

Respondent was required by a previous Order of the ALJ to provide medical treatment and TTD payments to claimant. K.S.A. 2010 Supp. 44-510h(a) requires an employer to provide medical treatment for an injured employee. Respondent could have requested that the ALJ suspend claimant’s benefits for failure to comply with medical treatment recommended by Dr. Burton, but instead respondent unilaterally suspended claimant’s benefits.

In *Bustillos*,¹⁴ a member of this Board wrote:

The Board has on other occasions determined that a request to change the authorized treating physician is the furnishing of medical treatment. The preliminary hearing statute found at K.S.A. 44-534a gives the ALJ authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the ALJ did not exceed her jurisdiction and the Board does not have jurisdiction to review the Judge’s preliminary Order for Medical Treatment.

In the current claim, the ALJ was not granting a request for a change of physician. Because respondent de-authorized Dr. Burton as the treating physician, claimant requested Dr. Moufarrij be appointed. As claimant had no authorized treating physician, the ALJ authorized Dr. Moufarrij as the treating physician. K.S.A. 44-534a gives the ALJ

¹³ Respondent’s Brief at 2 (filed July 19, 2011).

¹⁴ *Bustillos v. Farmland Nat’l Beef Packing Co.*, No. 1,034,587, 2008 WL 4763712 (Kan. WCAB Sept. 30, 2008).

authority to grant or deny a request for medical compensation. This Board Member concludes the ALJ did not exceed his authority. Therefore, the Board does not have jurisdiction to review the ALJ's Order.

The Board has ruled that the longstanding "contemporaneous objection rule" applies to a workers compensation claim.¹⁵ In *Waters*,¹⁶ the Board stated, "Although the rules of evidence are not strictly applied in workers compensation cases, the Board finds that the longstanding 'contemporaneous objection rule' applies to a workers compensation case. Accordingly, a party waives the right to complain that evidence was erroneously introduced unless a timely objection is made in the record making clear the grounds of the objection."¹⁷ K.S.A. 2010 Supp. 44-555c(a) limits the Board's review to those questions and issues presented to the ALJ. Because respondent's counsel failed to object during the preliminary hearing that claimant's Notice of Intent and/or Application for Preliminary Hearing was defective, this Board Member concludes the ALJ did not and could not consider the objection.

The Board does not have jurisdiction to address the issues of medical treatment and TTD at this juncture of the proceedings. Nor does the Board have jurisdiction to determine if Exhibit A to claimant's brief should be considered or whether K.S.A. 2011 Kansas Session Laws 44-515 and 44-510h(b)(1) should be applied retroactively.¹⁸ When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.¹⁹ Therefore, this Board Member is dismissing respondent's appeal. Accordingly, all other issues raised on appeal are moot.

¹⁵ *Smith v. Beachner Construction Company, Inc.*, No. 1,041,873, 2011 WL 2185258 (Kan. WCAB May 25, 2011).

¹⁶ *Waters v. Waters True Value Hardware*, No. 1,041,172, 2010 WL 4009114 (Kan. WCAB Sept. 17, 2010).

¹⁷ *Id.*, citing see *Anderson v. Scheffler*, 248 Kan. 736, Syl. ¶ 5, 811 P.2d 1125 (1991) and *State v. Carter*, 220 Kan. 16, Syl. ¶ 2, 551 P.2d 821 (1976).

¹⁸ The ALJ did not determine whether K.S.A. 2011 Kansas Session Laws 44-515 and 44-510h(b)(1) apply retroactively. But even if those laws were applied retroactively, respondent's action of terminating medical treatment would still have been inappropriate. Claimant had her counsel contact respondent's counsel in advance to reschedule an appointment with Dr. Burton. Other than the May 27, 2011, appointment, claimant never missed an appointment with Dr. Burton and she complied with his treatment recommendations. Claimant did seek additional time to decide whether to undergo surgery. That cannot be construed as a refusal of medical treatment.

¹⁹ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.²⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²¹

WHEREFORE, the undersigned Board Member dismisses respondent's appeal and the June 16, 2011, Order entered by ALJ Clark remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Terry J. Torline, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

²⁰ K.S.A. 44-534a.

²¹ K.S.A. 2010 Supp. 44-555c(k).